UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

CHARLES FRANK CANALE, JR.,

Petitioner,

v. **Civil Action No.: 3:16cv400**

HAROLD W. CLARKE,
DIRECTOR OF VIRGINIA
DEPARTMENT OF CORRECTIONS

Respondent.

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

COMES NOW, Petitioner Charles Frank Canale, Jr., and submits the following Memorandum in Opposition to Respondent's Motion to Dismiss.

1. Petitioner's current federal habeas petition raises the following claims:

    (1) The trial court erred in denying Canale's motion to inspect the original computer evidence – Due process and Sixth Amendment violation; and

    (2) The trial court erred in upholding the trial court's decision to deny Canale's motions to strike because the Commonwealth had not proved beyond a reasonable doubt that Canale knew or should have known that "ridergurl80" was under 15 years old – insufficient evidence under the Fourteenth Amendment.

    Respondent concedes that "the petitioner presented similar claims to the Supreme Court of Virginia in his direct appeal." Respondent's rationale for filing its Motion to Dismiss is that, although the claims presented to the Supreme Court of Virginia were "similar", Respondent claims that Petitioner "relied on different principles" and made "no federal constitutional arguments in state court." However, Respondent's argument fails under the principles of *Jackson v. Virginia*, 443 U.S. 307, 321 (1979) and subsequent cases.

Respondent's AEDPA Argument

2. In relation to the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), Respondent correctly claims that the statute provides that "a federal court may not grant a state prisoner's habeas application unless the relevant state-court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" However, the Court may grant Habeas relief under the "unreasonable" standard presented by Respondent ***or*** if the Court finds that the State proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d). In the instant case, it is evident that the State court's due process rulings were unreasonable under either standard.

3. Further, in attempting to describe the AEDPA standard, Respondent cites cases that are not germane to the due process violations at issue in the instant case. See, e.g., *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006) (denial of Habeas petition claiming ineffective assistance of counsel under the Sixth Amendment was not unreasonable when it was based on a claim that the Petitioner was housed hours away from his lawyers, and the petitioner did not properly allege that he was prejudiced by this deficiency.); *Knowles v. Mirzayance*, 556 U.S. 111 (2009) (denial of the ineffective assistance of counsel claim did not violate clearly established federal law because case law did not require defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success); *Cullen v. Pinholster*, 563 U.S. 170 (2011) (Petitioner failed to show ineffective assistance of counsel where the prisoner's evidence of mitigation was improperly considered on federal habeas review. Review under 28 U.S.C.S. § 2254(d)(1) was limited to the record that was before the state court which

adjudicated the prisoner's claim on the merits); *Schriro v. Landrigan*, 550 U.S. 465 (2007) (Habeas petition denied when Defendant could not show prejudice from any failure of counsel to investigate additional mitigating evidence, the record indicated that defendant would have refused to allow his counsel to present the evidence and defendant understood the consequences of refusing to allow evidence in mitigation); *Tucker v. Ozmint*, 350 F.3d 433 (4th Cir. 2003) (Habeas based on ineffective assistance of counsel denied when counsel failed to provide to a defense expert witness reports relating to the accused's childhood sexual abuse because counsel presented a substantial mitigation case at sentencing).

Claim 1: The trial court erred in denying Petitioner's motion to inspect the original computer evidence – Due process and Sixth Amendment violation

4. Petitioner's first claim in the instant Petition stems from the trial court's refusal to allow Petitioner to inspect the original computer evidence that the Commonwealth of Virginia relied on to support his conviction. The evidence presented consisted of what was described as a "copy/paste" reproduction of the originals by a police investigator. When pressed to present the original evidence logs that were "copy/pasted" for validation by the defense, the Commonwealth refused. When Petitioner offered to have the Commonwealth's own computer forensics expert, who himself was a sworn law enforcement officer, conduct the validation and produce the evidence's meta-data, the Commonwealth surprisingly refused again. For reasons unknown to Petitioner, the Commonwealth was opposed to validating its own evidence. To date, Petitioner has no assurance that the evidence used to secure his conviction was complete, unaltered, and reliable.

5. The Fourth Circuit has rejected some of the same arguments that Respondent presents in its

attempt to persuade this Court to dismiss the Petition. In *Jones v. Sussex I State Prison*, 591 F.3d 707 (4th Cir. 2010), the Fourth Circuit reiterated that a "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim . . . a case deciding such a claim on federal grounds." *Jones*, at 713 (citing *Reese*, 541 U.S. at 32. The Court drew no distinction between citation to a state as opposed to a federal case. *Id*.; see *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc) ("[F]or purposes of exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue."). In its analysis, the Fourth Circuit further emphasized that this view is shared by other appellate courts, stating “our sister circuits have uniformly concluded that citation to such a state case, as a general matter, provides fair presentment of a federal constitutional claim.” *Jones*, at 713, (citing *Jackson v. Edwards*, 404 F.3d 612, 618 (2d Cir. 2005); *Peterson*, 319 F.3d at 1158; *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Barrett v. Acevedo*, 169 F.3d 1155, 1161-62 (8th Cir. 1999); *Hannah v. Conley*, 49 F.3d 1193, 1196 (6th Cir. 1995); *Scarpa v. Dubois*, 38 F.3d 1, 6-7 (1st Cir. 1994); *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001) (finding that petitioner's citation to a state case "alerted the state court to his Sixth Amendment claim" and thus fairly presented the claim)). Accordingly, the Fourth Circuit found that the petitioner “had properly alerted the state courts to the federal nature of his claim when he used clear double jeopardy language in his briefs, and he presented a fact pattern that Virginia courts had regularly considered appropriate for double jeopardy analysis.” *Id.*

6. In the instant case, Petitioner properly alerted the state courts of his Due Process claim. The Petition for Appeal filed with the Supreme Court of Virginia states:

> **"[T]he right to call for evidence in his favor, including the right to prepare for trial ... and to ascertain the truth ... lie at the heart of a fair trial, and when they are abridged, an accused is denied due process."** Id. at 547, 787 (internal citations omitted). "[A] criminal trial is fundamentally unfair if the State proceeds against [a] ... defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Henshaw v. Commonwealth*, 19 Va.App. 338, 334, 451 S.E.2d 415, 418 (Va. App. 1994) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985)) (emphasis added). "[A]ll relevant facts must be available to both the prosecution and the defense in order to preserve the [adversarial] system's integrity." Id. (quoting *Cox v. Commonwealth*, 227 Va. 324, 328, 315 S.E.2d 228, 230 (1984)).

See *Respondent's Motion to Dismiss*, Exhibit 3, p. 16. (Emphasis added).

The Petition expressly claimed that a due process violation had occurred when the Court refused to Order the Commonwealth to cause or permit inspection of the evidence.

7. As described above, Petitioner expressly alerted the Virginia courts of his Due Process claims. Additionally, Petitioner also cited federal due process cases to support his assignments of error in the Virginia courts. Petitioner's due process argument was based, *inter alia*, in *Henshaw v. Commonwealth*, 19 Va.App. 338 (1994). Henshaw quotes *Ake v. Oklahome*, a federal due process case, for supporting its ruling that due process is denied when a defendant is denied access to the "raw materials integral to the building of an effective defense." *Henshaw*, 19 Va.App. at 344. Furthermore, the *Henshaw* due process analysis is further predicated in other federal Constitutional due process decisions. See, e.g., *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense"; *Chambers v. Miss*., 410 U.S. 284; *Henshaw*, 19 Va.App. at 340 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

8. As in *Jones*, here Respondent attempts to "circumvent this more than ample authority supporting [Petitioner's] contention that" Petitioner "fairly presented" his claim. *Jones* at 714. Just as in *Jones*, here "the Commonwealth offers a technical argument. Virginia contends that Jones's failure to include . . . language specifically in his assignments of error on direct appeal" precludes this Court from holding that he fairly presented that claim. *Id*. As in *Jones*, here the Commonwealth "directs our attention to the Rules of the Supreme Court of Virginia, which provide that [o]nly errors assigned in the petition for appeal will be noticed by this Court." *Id*. (citing Va. Sup. Ct. R. 5:17(c)). However, just as in *Jones*, here the Commonwealth "cites no authority for the proposition that a petitioner exhausts for federal habeas purposes only 'assigned' errors." The Fourth Circuit further noted that "although we of course defer to appropriate state procedural rules in determining if a petitioner has exhausted a claim, we have previously disregarded a Virginia defendant's failure to identify a claim in his assignments of error, finding the claim fairly presented by the argument section of his brief." *Id*.

9. Respondent, in the Motion to Dismiss, narrowly refers to Claim I as a "Discovery Claim". See *Respondent's Motion to Dismiss*, p. 7. In support, Respondent cites the opinion of the Court of Appeals dismissing Petitioner's direct appeal. Petitioner articulated to the Court of Appeals of Virginia that the Petitioner's claim stemmed from the failure to produce the original evidence for inspection as mandated under the due process requirements of *Henshaw*. See e.g. Exhibit A, p. 6 (Virginia Court of Appeals Petition for Appeal); Exhibit B (Respondent's Petition for a Virginia Court of Appeals Three-Judge Panel Review). The three-panel judge review took place on or about September 30, 2013. During the hearing, Petitioner, through counsel, explained to the Virginia Court of Appeals that the issue did not simply involve a discovery rules violation but a failure to produce the raw original evidence for inspection, a

due process violation. See Exhibit C. Further, the same due process argument was again presented to the Supreme Court of Virginia during the oral argument in the original Petition for Appeal and again in a Petition for Rehearing. See Exhibit D, p. 6 (Virginia Supreme Court Petition for Rehearing).

10. In addition to the due process claim described above, Petitioner was also denied his right to effective assistance of counsel. The Virginia courts' failure to allow Petitioner to inspect the original evidence interfered with Petitioner's counsel investigation of the case. *Brown v. Dixon*, 891 F.2d 490, 495 (4th Cir. N.C. 1989). The Commonwealth's interference with the defense investigation and the trial Court's endorsement of the same deprived Petitioner of his right to effective assistance of counsel. See *United States v. Cronic*, 466 U.S. 648, 662 (1983) ("Only when . . . circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial") (citing *Powell v. Ala*bama, 287 U.S. 45 (1932). In this case, Petitioner's defense was shackled by lack of absence to critical evidence that counsel required for trial preparation. See *Brown*, 891 F.2d at 495. This argument was repeatedly presented to the Virginia courts. See, e.g., Exhibit E, p.2 (Response to Motion to Dismiss Habeas) and Exhibit F, pp. 10-11 (Supreme Court of Virginia Habeas Petition).

11. Petitioner expressly alerted the Virginia courts of his Due Process claim. Furthermore, Petitioner advised the Virginia courts that failure to allow for counsel's inspection of the original evidence deprived Petitioner of his right to effective assistance of counsel. Therefore, Claim 1 is properly before this Court.

Claim 2: The Virginia courts erred in upholding the trial court's decision to deny Canale's motions to strike because the Commonwealth had not proved beyond a reasonable doubt that Canale knew or should have known that "ridergurl80" was under 15 years old – insufficient evidence under the Fourteenth Amendment.

12. The Supreme Court has held that any claim of insufficient evidence is necessarily a federal due process claim. See *Jackson v. Virginia*, 443 U.S. at 321; *In re Winship*, 397 U.S. 358 (1970). See also *West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991) (any challenge to sufficiency of evidence is necessarily due process challenge), overruled on other grounds, 505 U.S. 277 (1979).

13. The Fourth Circuit's *West* opinion is on point and controlling. In *West*, the petitioner raised the sufficiency of the evidence challenges at several points. The petitioner moved at the close of the Commonwealth's case to strike the evidence as insufficient, renewed the sufficiency motion at the close of the evidence, and pursued the claim as an assignment of error on appeal. The petitioner asserted "that the evidence was insufficient to convict him and that the Commonwealth had not proved his guilt beyond a reasonable doubt". *West*, 931 F.2d at 266. The Fourth Circuit held that "at all these stages, West adequately alerted the state courts that he was raising a constitutional claim. Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction." *Id*. (citing *Jackson v. Virginia*, 443 U.S. 307, 321 (1979).

14. The instant case is analogous to *West*. Here, Petitioner raised the issue of the sufficiency of the evidence at the end of the Commonwealth's case through a Motion to Strike, at the close of the evidence through a renewed Motion to Strike, and pursued the claim during the appeal. Even assuming, *arguendo*, that Petitioner "did not couch his objections and challenges in state

court in specific constitutional terms", it would be "of no consequence; it is not necessary to cite 'book and verse on the federal constitution' so long as the constitutional substance of the claim is evident." *Id.* (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir. 1983) (claim in state court that "case fell far short of that required to prove . . . guilt beyond a reasonable doubt" adequately raises due process claim)). Just like *West*, here Petitioner's "challenge to the sufficiency of the evidence under the federal due process clause to convict him thus has been properly exhausted in the state courts." *Id.* At all relevant times, Petitioner averred that "the Commonwealth failed to present sufficient evidence beyond a reasonable doubt." See, e.g. Exhibit A, pp. 5-6, 11.

15. Petitioner's challenge to the sufficiency of the evidence is necessarily a federal due process claim. Therefore, Claim 2 is properly before this Court.

WHEREFORE, the petitioner respectfully requests this Court to Deny the Respondent's Motion to Dismiss the petition for a writ of habeas corpus.

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By Counsel

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CERTIFICATE OF SERVICE

On October 14, 2016, I electronically filed this Memorandum in Opposition to respondent's Motion to Dismiss with the Clerk of Court by using the CM/ECF system which will send notice to the following CM/ECF participant:

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